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No 73-984

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE WICHITA INDIAN TRIBE OF OKLAHOMA ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A, 1a-36a) is reported at 479 F.2d 1369. The opinion of the Indian Claims Commission (Pet. App. D, 1d-10d) is reported at 22 Ind. Cl. Comm. 1.

JURISDICTION

The judgment of the Court of Claims was entered on June 20, 1973. The order of the Court of Claims denying the petitioners' timely motion for a rehearing was entered on September 28, 1973 (Pet. App. B, 1b-2b). The petition for a writ of ceritorari was filed on December 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the intervention by petitioners in a suit between other tribes and the United States, nearly 20 years after the final date for filing claims before the Indian Claims Commission, is barred by the statute of limitation contained in the Indian Claims Commission Act, 60 Stat. 1049, 1052, as amended, 25 U.S.C. 70k.

STATUTE INVOLVED

Section 12 of the Indian Claims Commission Act of 1946, 60 Stat. 1052, 25 U.S.C. 70k, provides in pertinent part:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claims existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress.

STATEMENT

Petitioners moved to intervene in the timely filed case of the Kiowa, Comanche and Apache Tribes, Docket No. 257, before the Indian Claims Commission, on March 16, 1970, nearly 20 years after August 13, 1951, the final date for filing claims before the Indian Claims Commission. In their intervention motion, petitioners claimed compensation for lands in western Texas and Oklahoma, which they alleged they owned by aboriginal title and which they alleged had been taken from them by the United States without just compensation. Their claim was adverse to that of the plaintiffs, who claimed aboriginal title to much of the same land, and, additionally, increased the total claim against the United States. The

Commission allowed the intervention 24 Ind. Cl. Comm. 405 (Pet. App. C, 1c-2c). The United States appealed to the Court of Claims which reversed the decision of the Indian Claims Commission and remanded the case for further proceedings consistent with the Court of Claims' Opinion.

ARGUMENT

1. The Indian Claims Commission Act, *supra*, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and *no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.* [60 Stat. 1049, 1052, 25 U.S.C. 70k. Emphasis supplied.]

Thus Congress, in establishing the Commission and in creating a cause of action where, for the most part, none had existed before, emphatically required that all claims under the Act be brought within the time period specified in the Act, or be barred. Petitioners did not bring their claim until almost twenty years after the cut-off date of August 13, 1951, established by the Act. The Act is jurisdictional and petitioner's intervention was thus properly denied. *United States ex rel. Texas Portland Cement Company* v. *McCord*, 233 U.S. 157, 162.

2. It is true as petitioners point out (Pet. 20-22) that the Court of Claims in *The Blackfeet and Gros Ventre Tribes, et al.* v. *United States*, 162 Ct. Cl. 136, permitted an intervention after the date for filing an original claim had passed. That case, however, presented a peculiar situation in which the original claimants sought a recovery based upon a treaty to which both they and the intervenors were signatories. Prior litigation had established that

they jointly owned the land in question and had established the percentage of ownership of each. The Court of Claims held that the claim by one joint owner preserved the claim of the other. *Id.* at 142. In so holding the court noted that all of the issues presented in the intervention were present in the original claim, that the government thus had had notice of those claims from the time the original suit was filed, and that the course of litigation would not be interrupted by permitting the intervention. The court concluded that "the [intervenors] are not asserting a new or separate claim which would be untimely under section 12 of the Act" *(id. at* 144).

Here, by contrast, there is no common and undivided or joint interest between the petitioners and the Kiowa, Comanche and Apache Tribes. They are not signatories to a common treaty. Moreover, the question whether the petitioners had aboriginal title to much of the land claimed by the original claimants presents a new and adverse claim dependent on different facts—and which, as the Court of Claims noted, could result in the defeat of the claim of both claimants if it showed that neither had exclusive possession of the land (Pet. App. A, 21a).

Since the petitioners do not have a joint claim with that of the original claimants and rely on different and inconsistent allegations of fact, the petitioners' claim for aboriginal title was obviously not presented by the timely filed claim of the Kiowa, Comanche and Apache Tribes and has not been preserved.[1]

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[1] *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, also relied upon by petitioners, does not, as they admit (Pet. 26), concern intervention by a new party, but a liberal interpretation by the Court of Claims allowing the original claimant to amend its pleadings. There is no conflict between that case and the present case.

3. There is no conflict between the decision of the Court of Claims and that of any other court except an arguable conflict with a decision of the Indian Claims Commission. See *Lipan Apache Tribe, et al.* v. *United States*, 22 Ind. Cl. Comm. 1 (Pet. App. D). The Court of Claims, however, has appellate jurisdiction over the Indian Claims Commission. Section 20, Act of August 13, 1946, 60 Stat. 1054, as amended, 25 U.S.C. 70s. There is thus no conflict requiring resolution by this Court. Moreover, while considerable liberality is appropriate in interpreting grounds for relief under the Indian Claims Commission Act, it would be a gross distortion of the Act to keep it perpetually alive by allowing unlimited intervention after the limitation date. The Court of Claims in this case and *Blackfeet* has drawn appropriate boundaries for intervention and further review is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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